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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1982

NO._____

MARTIN CAVALIER
Petitioner

VS.

T. SMITH & SON, INC., ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT AND APPENDICES

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QUESTIONS PRESENTED

1. Is the negligence of a seaman, who is using vessels gear and doing the vessels work the "negligence of a vessel" within the meaning of 905 (b) if that negligence harms a longshoreman when both the seaman and the longshoreman have the same employer.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Martin Cavalier, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeal, Fifth Circuit, entered in the above case, February 26, 1982, rehearing denied April 13, 1982.

OPINION BELOW

The opinion of the Court of Appeal, Fifth Circuit is reported 668 F.2d 861. The opinion of the District Court, Eastern District of Louisiana, is reported in 499 F. Supp. 650.

JURISDICTION

The jurisdiction of this Court is invoked uner 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Is the negligence of a seaman, who is using the vessels gear and doing the vessels work the "negligence of a vessel" within the meaning of 905 (b) if that negligence harms a longshoreman when both the seaman and the longshoreman have the same employer.

STATUTORY PROVISIONS

905 (b) of the Longshoreman and Harbor Workers' Act as amended 1972.

Sec. 5

"(b) In the event of injury to a person covered under this act caused by the neglgience of a vessel, then such person, or anyone entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this ACT, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under the subsection shall not be based on the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this ACT.

STATEMENT OF THE CASE

This case was decided by the Trial Court from fact stipulations and fact findings at the trial of the cause*. The Court, in written reasons granted judgment dismissing plaintiff/petitioner's case and held that plaintiff/petitioner, a longshoreman, was injured by the negligence of a seaman member of the crew of the vessel; nevertheless, plaintiff/petitioner's exclusive remedy against the defendant was under the Longshoreman and Harbor Workers' Compensation Act because a single company both owned the vessel and employed plaintiff/petitioner. The Court said in essence that although the injury was caused by a vessel's being used to carry out it's function, the use was superseded by the designation of that function as a longshoring operation. However, in an addendum to the findings of fact and conclusions of law, the trial court took notice that a review court would have a completely equivalent ability to resolve the issue. For judicial economy and in the interest of justice, the court stated that had plaintiff/petitioner prevailed and had a different conclusion as to liability been reached, the court would have awarded the following:

Past, present and future pain and suffering and permanent disability	$110,000.00
Medical and hospital expenses	3,460.72
Past, present and future wage loss	87,000.00
	$200,460.72

*See Appendix A for fact stipulations, findings of fact and conclusions of law of trial court.

On appeal to the Fifth Circuit Court of Appeals the Court found that:

"1. Worker's Compensation

Longshoreman injured by negligence of crew of vessel may sue owner of vessel even though owner is also his employer, liable to him for compensation under Longshoremen's and Harbor Worker's Compensation Act., §§1-51,33 U.S.C.A. §§901-950.

2. Workers' Compensation

Longshoreman's action for negligence of vessel owner was barred, where injury was caused by negligence of persons engaged in providing stevedoring services to vessel. Longshoreman's and Harbor Workers' Compensation Act.,§ 5 (b), 33 U. S. C. A. §§905(b)."

REASONS FOR GRANTING WRIT

1.Petitioner's case is based on principal, considered to be well settled, that the Yaka Rule survived the 905(b) amendment to the Longshoreman and Harbor Worker's Compensation Act.

In Reed v. The YAKA 83 S. Ct. 1349 (1963), the Supreme Court held that the economic burden of a longshoreman tort recovery must ultimately fall upon the party whose negligence or fault caused the injury.

Thus under the YAKA rule a longshoreman could sue a vessel owner who was also his compensation act employer in every case where the same vessel would be liable if not his employer and the fact that:

"There is no distinction in admiralty between torts committed by the ship's personnel while operating it, any more than there is between torts "committed" by a corporation and by its employees."

Gutierriz v. Waterman Steam-Ship Corp. 83 S. Ct. 1185 (1963)

Petitioner submits that the issue in this case is: Was it the intent of Congress in enacting § 905(b) to make a seaman-crewmember while using the vessel's appurtenances during the scope and course of his employment have a change in status and become a person engaged in providing stevedoring services to a vessel.

The narrow question raised herein for the attention of the Court is whether the exclusions of LHWCA § 905(b) includes the responsibility of a vessel owner for the negligence of the crew of a vessel to a longshoreman injured by them who was also employed by the vessel owner. This of course would insulate the seaman's vessel owner employer against a tort action by the employer's longshoreman-temporary employee from a separate division of a multi-faceted corporate enterprise. This situation raises the issue of a seaman's status and whether it is to be ignored once it has vested.

Counsel submits that the nature of the seaman-crew members' employment should establish their employer as liable in tort for their negligence in performing their duties as seamen.

This Court might consider the following analogies which a fortiori would seem to follow from the Fifth Circuit holding in this case.

When a fireboat owned by a multi-faceted company is extinguishing a fire aboard a vessel and the fireboat crew member stops directing a hose stream upon the vessel in distress and goes aboard the vessel to aid stevedores employed by the same multi-faceted company to remove cargo off the ship, has the seaman become a person engaged in longshoring activities should he negligently injure one of the longshoremen. Is his status as a seaman changed because his performance of a function of his vessel has entailed actions which may also be performed by a longshoreman?

Second, if a member of the crew of a flat-bottom vessel also owned by a multi-faceted company while unloading cargo off a ship which cannot navigate beyond jetties injure a stevedore employee of the same company, is the negligence of that crew member of the flat-bottom vessel which was to proceed some 50 miles upriver to an unloading port with cargo not a seaman of his vessel at that point in time but a person performing longshoring services?

Thus, even in this situation where the function of a vessel is to remove and transport cargo from one port to another while engaged in its function do it's crewmembers become persons engaged in longshoring operation and are exempt under § 905 (b) when they negligently injure a true longshoreman.

These analogies are plausible extensions of the

interpretation as set forth by the Fifth Circuit Court holding in this case. In opposing that holding, counsel respectfully argues that seamen have held a special status in the courts, and that status is not stripped away because of the nature of a particular task done while aboard or even on shore when in the service of the vessel. Baking bread in a sea-going vessel's gallery does not transform a seaman into a baker; painting a hull of a vessel does not transform the seaman into a painter. Seamen are still seamen when they are in automobiles or on land, depending on the facts present, according to admiralty casebook law. See "Admiralty", Healy and Sharpe. They need only be attached to their vessel.

The Fifth Circuit in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) enunciated the breadth of the term "seaman": "Expansion of the terms "seaman"... are (sic) consistent with the liberal construction of the act." 266 F.2d at 780.

See, Senko v. LaCrosse Dredging Corp., 352 U. S. 270 (1957); Spiller v. Lowe, 328 F. Supp. 54 (W. D. Ark., 1971); Luckett v. Continental Engineering Co., 649 F. 2d 441, 445 (6th Cir. 1981). Also, the term was open to admit cooks, roughnecks, (Robison, supra) and other employees "whose duties contribute to the operation and welfare of the vessel." (Wilkes v. Miss. River Sand & Gravel Co., 202 F. 2d 383, 388 (6th Cir. 1953). This legislative intent and judicial elaboration thereof as to the special status of seamen is longstanding

over a period of many years. It is submitted that only by denying that status can the holding of the appellate court be affirmed so that in the instant case the seaman-crewmember tortfeasors were, in essence, fellow longshoremen of petitioner.

The Court's liberal construction of protective legislation granting rights to seamen and longshoremen is legion in American jurisprudence. Causes under the LHWCA and Jones Act are permitted by broad interpretation of the two legislative schemes.

While a "trade-off" in the amendment to the 1972 LHWCA is clearly intended in the master-servant relationship as to compensation of work-related injuries, nevertheless, the seaman and longshoreman have been held as "wards of the court" because of their relative weakness vis a vis maritime employers-entrepreneurs. When the courts allow redress of injuries under the two acts, they are affording a "small" plaintiff ways to be compensated. Petitioner contends that the same spirit in solicitude for the "small man's " redress should inspire interpretation of the acts, here the LHWCA, to allow as many as possible modes of recovery for an injury sustained in the maritime world.

In Fitzgerald v. Compania Naviera la Molinera, 394 F. Supp. 402, 409 (E. D. La. 1974) the court stated:

> "The suit against the vessel owner is not to be denied because the visual scheme of structuring the employment relationships along the waterfront is not followed."

The facts of the case at bar present to this Court

the interstice between the two acts (Jones Act and LHWCA). Congress has never expressed the intent to convert some seamen into longshoremen. Petitioner urges that this Court apply §905(b) to the facts before it, including the stipulation that the tortfeasors were seamen. Were the Patricia the vessel of a third party, its crewmen's acts would cause its owner to be liable to Cavalier, a longshoreman. The fortuity of being a multi-faceted corporation should not shield T. Smith from liability as an extra perquisite of corporate power. Rather the traditional juridical concern for the maritime worker should apply and allow an avenue of redress for a longshoreman to fill the blank space between the Acts.

Petitioner respectfully submits that the conclusion of the Fifth Circuit Court of Appeals that the seamen-crew members were acting as persons providing stevedoring services when Cavalier was injured is not a correct conclusion and infringes the status of seamen, opening the door to future litigation of such a premise by aggrieved seamen and longshoremen and should not be maintained by this Court.

This holding extends the Act in a direction which, if followed, will distort the Act to permit the following hypothetical yet plausible, logical conclusion: A seaman who has no claim for negligence and cannot recover in general maritime tort or under the Jones Act may claim coverage of LHWCA for his injury by a fellow seaman-crew member during the handling of cargo or stevedoring operations by their vessel. § 905(b) contains language: "If such person [claimant] was employed by the vessel

to provide stevedoring services...". Arguably the transformation of seamen into longshoremen, when benefits can accrue only by the above language, which does not exclude seamen.

Further, if there is actionable negligence of a fellow crew member such as would allow a seaman his Jones Act and/or maritime tort recovery, does the fact that the injury occurs during the handling of cargo preclude or deny the seaman his Jones Act and/or General Maritime tort recovery because both employees were engaged in "stevedoring services"?

Petitioner contends that the Patricia crew members were agents of their vessel at all times, according to jurisprudence defining seamen and were in fact stipulated to be seamen and members of the crew. The crane performed various maritime jobs, including pulling anchors, lifting equipment, etc. in addition to handling cargo. Petitioner respectfully submits that this Court reconsider the facts of the Cavalier case.

It is further respectfully submitted that the point which counsel is attempting to make in Cavalier is that a member of a crew of a vessel always act as the vessel owner's agent when he performs a function of vessel and it was not the intent of Congress in acting 905(b) to change its traditional concept.

> "4. The House Report states:
> The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused

> by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repair men as apply when a a independent contractor employs such persons. 3 U. S. Code Cong. & Admin. News, p. 4705 (1972)
>
> Smith vs. Eastern Seaboard Pile Driving Inc. 604 F.2d at 795 (1979)

Certainly, in the instant case if the derrick barge Patricia had been owned by a third party, unquestionably a 905 (b) action would lie. The negligent derrick operator crewmember of the Patricia would have been an agent of the shipowner, and Cavalier would have been an employee of the stevedore T. Smith & Son.

Further, throughout the circuits that have dealt with this problem the nexus seems to be that even though both parties were working at the same task would they have been employed normally by the same employer. This would not have been the cause under the facts of Cavalier without a large multi-faceted corporation. Longshoremen are employed daily from the Union Hall and vessel owners are a catagory in themselves and employ their crew permanently to man their vessel under fixed wages, vacation pay and different terms and conditions from that of employment of a longshoreman.

The Fifth Circuit Court of Appeals held however that the negligence of a member of the crew of a vessel were considered under 905 (b) to be providing stevedoring

services to a vessel even though they were carrying out one of the functions for which their vessel was specifically designed.

The Fifth Circuit Court of Appeal's ruling of February 26, 1982 is in conflict with the United States Supreme Court, Scindia Steam Navigation Co., Ltd. vs. Santos 101 U. S. 1614 68, L.Ed. 2d 1, 1981, when the United States Supreme Court said that"...the vessel may be liable (under 905 (b) if actually involved itself in cargo operation and negligently injuries a longshoreman or if it fails to exercise due care to avoid exposing longshoreman to harm from hazards they may encounter... from equipment under the active control of the vessel during stevedoring operations" and that the Fifth Circuit Court of Appeals ruling fails to recognize that longshoreman employed by the vessel is to be treated no differently than if the vessel had been owned by a third party . See, Smith v. M/V Captain Fred 546 F.2d 119, 123 (5th Cir. 1977).

The rationale of the ruling in the instant case would either deny a 905 (b) action when a vessel crewmember negligently injuries a longshoreman while assisting in longshore operations which would be contrary to Santos or would discriminate against a longshoreman employed by the vessel when he is injured by a seaman working for the same employer. The result reached in this case being contrary to the legislative history accorded 905(b) relief to longshoreman regardless of who owned the vessel for acts of negligence committed by the vessel crew members while assisting in longshoring as authorized

in Santos, supra is clearly wrong.

SUMMARY OF ARGUMENT

Plaintiff/Petitioner contends that he was injured through the negligence of a vessel, the derrick barge Patricia because of actionable errors committed by members of the crew who were seamen permanently assigned to the vessel. At the time of the injury the crewmen were carrying out the function for which the vessel was designed. The fact that the derrick barge was using its permanently fixed crane to facilitate removal of heavy cargo from a ship does not take away the responsibility of the vessel owner for the negligence of the vessel through the action of its crew.

Plaintiff/Petitioner submits that the ownership of a vessel by a multidivision large corporation which also employs traditional longshore gangs in another division does not lessen the legal responsibilities and obligations of that corporate vessel owner to answer for the negligence of members of the crew of its vessel during the carrying out of the function of the vessel.

Therefore, petitioner contends that he has a valid action against the defendants under 33 U. S. C. A. 905(b) in that petitioner's injuries were caused by a vessel through the negligence of members of its crew.

Thus it would follow that there is jurisdiction and a cause of action in the instant case under the General Maritime Law of the United States and any other applicable Federal and/or State statute including Section

905 (b) of the LHWCA as amended in 1972.

CONCLUSION

For the reasons set forth above, Petitioner prays that a writ of certiorari be granted, and that, upon due proceedings had, the judgment of the Court of Appeal, Fifth Circuit, be reversed, that T. Smith & Son, Inc. be held liable to petitioner under applicable law, or that this case be remanded for further proceedings in accordance with applicable law.

Respectfully submitted,

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APPENDIX "A"

FACT STIPULATIONS AND FINDINGS OF FACT AT TRIAL OF CAUSE

1. In January of 1977, T. Smith contracted with the owners of the M/V Sei Shin to unload cargo from the vessel onto river barges.

2. To unload said vessel, T. Smith employed a longshore gang who were hired from the union hall and were paid on an hourly basis.

3. The derrick barge Patricia, owned and operated by T. Smith, is a navigable vessel, 200 feet in length, 56 feet in width and 11 foot depth, on which is mounted a traveling gantry crane. The vessel is designed for making heavy lifts. As used by T. Smith, the vast majority of its work is the loading and unloading of cargo to and from vessels, although on occasion it is used to make other lifts, e.g. ship's anchors, ship's machinery.

4. The derrick barge Patricia is crewed from a special pool of permanent employees of T. Smith, who are paid a fixed salary with overtime and vacation pay

and were not hired from the union hall. These crew members permanently worked only on derrick barges.

5. The crew of the Patricia are never intermingled and/or assigned to work in a longshore gang.

6. The duties of the crew of the Patricia were to maintain the vessel, paint and chip, tie up, cast off and to perform any duties necessary to carry out the function of the vessel.

7. On Febraury 1, 1977, T. Smith was engaged in performing its contract to discharge the M/V Sei Shin, then berthed at the Louisiana Avenue Wharf. Plaintiff, Martin Cavalier, was a member of T. Smith's longshore gang, which was working inside the hatches of the Sei Shin hooking up the drafts of cargo. The Patricia was lifting the drafts, once hooked up by the longshoremen, out of the ship and landing them in the river barges where the drafts were unhooked by other longshoremen. Work commenced at 6:00 p.m., and the accident occurred at approximately 3:00 a. m. on February 1, 1977.

8. At approximately 3:00 a. m., plaintiff's gang was working in the No. 1 hatch hooking up drafts of 30 foot pipe in slings attached to the fall of the derrick.

Anderson Nicholas, a member of the crew of the derrick, was standing over the No. 1 hatch, at the main deck of the Sei Shin, signaling Merlin Culver, the operator of the derrick crane who was also a member of the crew of the derrick, as he lifted the drafts of cargo out of the ship hold.

9. Through an error in judgment (negligence) of either the crane operator (Culver) or the flagman (Nicholas), the draft failed to clear the hatch coaming at the main deck, striking same and causing the pipes to slide out of the slings and fall into the hatch below, seriously injuring the plaintiff.

10. The plaintiff's injuries included an open comminuted fracture of his proximal left femur, multiple rib fractures, a fracture of his left inferior ischio-public ramus, a dislocation of the symphsis pubis and of the right sacro-iliac joint.

11. As a result of plaintiff's injury, T. Smith, through Employers National Insurance Company (its compensation insurer), has incurred medical expenses and paid compensation benefits to plaintiff under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

12. Plaintiff has brought suit against T. Smith under 905 (b) of Longshoremen's and Harbor Workers' Compensation Act for injuries sustained in the accident. The plaintiff alleges that T. Smith is liable under 905 (b) as owner of the vessel Patricia because of the neglience of the crew members. T. Smith defends alleging that plaintiff cannot recover because he was injured by employees providing stevedoring services.

Conclusions of Law

1. The specific issue before this court is whether the accident causing injury to plaintifff falls under the exclusion of 905 (b) that provides "if such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel," so that the derrick barge Patricia and its owner, T. Smith and Son, are immune from a negligence action under 905(b).

2. The negligence of the Patricia is not disputed, nor is it disputed that the plaintiff is a person covered under the LHCA. Although the plaintiff was not providing stevedoring services to the Patricia, but, rather, the Sei Shin, the Patricia falls within the definition of

vessel in the LHCA because it was a vessel "upon which or in connection with which any person entitled to benefits under this chapter suffers injury...in the course of his employment,"33 U.S.C. 902 (21).

3. Although defendant, T. Smith and Son, is the employer of the plaintiff as well as the owner of the vessel, the Fifth Circuit held in Smith v. M/V Captain Fred, 546 F.2d 119 (C. A. 5th Cir., 1977), that a longshoreman may sue his employer qua vessel under 905(b). Therefore, absent the applicability of the exclusion set out in the second sentence of 905(b), the plaintiff could recover in a negligence action against T. Smith and Son.

4. In Captain Fred, the court interpreted the following report of the House Committee as indicating that they intended the Yaka rule to survive the 1972 amendments of the LHCA:

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S. S. Yaka, 373 U. S. 410 (83 S. Ct. 1349, 10 L.Ed.2d 448) (1963) and Jackson v. Lykes Bros. Steamship Co., 386 U. S. 731 (87 S. Ct. 1419, 18 L. Ed.2d 488) (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly,

the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons."

5. This passage has been analyzed by other courts as a guide to interpreting the meaning of the exclusions contained in 905(b). In Edmonds v. Compagnie Generale Transatlantique, 99 S. Ct. 2753, 443 U. S. 256, 61 L.ed 2d 521 (1979), the U. S. Supreme Court, in dicta, said that the legislative intent was to "treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading and unloading services." The Supreme Court construed the second sentence of 905(b) "to permit a third party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury."

6. The Second Circuit Court of Appeals had occasion to consider the exclusion in the second sentence of 905(b) in Smith v. Eastern Pile Driving, 604 F.2d 789 (1979). That court said that "the key issue is whether the shipowner's employees who were at fault committed the negligent acts in their capacity as agents of the

vessel on the one hand or as employees performing longshoring ...services on the other." The court found that in order for the exemption to apply, "the injured worker and the neglient employee must both have been performing the same function, whether it be longshoring, shipbuilding, repair work or...some other task."

7. The Fourth Circuit Court of Appeals, citing the Smith v. Eastern case, came to the same conclusion as the Second Circuit in regards the second sentence of 905(b). Richardson v. Norfolk Shipbuilding, 621 F.2d 633 (1980). The Richardson case is very similar, factually, to the case at bar. In that case, two employees of Norfolk were doing repair work on the U.S.S. Nashville and in order to do their work, they were suspended in a tray along the ship by means of a crane. The crane was operated by an employee of Norfolk and was positioned on a wooden barge owned by Norfolk. The men were injured by the fault of the crane operator. Plaintiffs argued that they should recover because they were not providing repair services ot the barge, but were part of the crew. The court rejected that argument and held that the accident occurred while the employees were acting in the capacity of repairmen and, therefore, could not recover because of the exclusion of 905(b).

8. In the instant case, plaintiff is a longshoreman who was hired by T. Smith and Son for the sole purpose of assisting in stevedoring services being provided to the Sei Shin. The plaintiff was injured by regular employees of T. Smith and Son who were crew members

of the stevedoring vessel and who were at that time assisting in the stevedoring operations.

9. The parties have stipulated that if either the crane operator or the flagman had been injured in the present accident, instead of plaintiff, and elected to sue T. Smith and Son under the Jones Act, he would be adjudged a seaman as a matter of law. They have also stipulated that if either the crane operator or flagman had been injured in the present accident, instead of plaintiff, and elected to sue T. Smith and Son for compensation benefits under the LHCA, he would be adjudged a non-seaman and entitled to benefits under the Act on the grounds that his primary duty was that of longshoreman.

10. The court recognizes these stipulations as part of the record, however, what legal status these employees may be entitled to has no bearing on whether the exclusion should apply to the accident involved. As demonstrated by the cases cited earlier, the proper inquiry is in what capacity was the crane operator or the flagman acting at the time the accident occurred. At the time of the injury, one tortfeasor was operating a crane to remove cargo from the Sei Shin's hold and the other was signaling the crane operator. There is no doubt that they were engaged in providing stevedoring services to the vessel at the time they negligently injured the plaintiff.

11. In the House Committee Report quoted earlier, Congress made it clear that all workers covered by the act should ave the same rights no matter who the owner of the vessel

was. By this, Congress intended that not only should an injured worker not be precluded from a negligence action against the vessel merely because it was owned by his employer, but also intended that a worker not be given any greater rights because his employer happened to be the vessel owner. The purpose of the exclusions was to prevent the latter from happening.

12. If the plaintiff were to be allowed to recover in this case, the consistency of treatment would be destroyed. A longshoreman injured, as the plaintiff was here, from the negligent operation of a floating crane would recover, but one injured through the negligent operation of a shore-based crane would not. Such a result would create a purely fortuitous distinction not intended by the drafters of 905(b).

13. Therefore, for the above reasons, the plaintiff is not entitled to a negligence action against T. Smith and Son because he was injured by employees providing stevedoring services.

ADDENDUM

Having concluded that the stipulated facts do not accord plaintiff a cause of action against T. Smith and Son under 905(b), yet taking into account that a reviewing court will have a completely equivalent ability to resolve this issue, I believe that judicial economy and the interest of justice are best served if I turn to a full consideration of plaintiff's damage claim.

Cavalier suffered severe and painful injuries

as a result of the accident on February 1, 1977. The steel pipes struck his left leg, knocking him down and among other pipes stowed in the hold of the ship and also caused injury to his head, ribs and hip. He sustained a scalp laceration, compound fracture of the left femur, multiple fractures of his ribs on the left side, separation of the symphysis pubis and fracture of the inferior part of the left pubis.

He was an inpatient at Touro Infirmary and later at Ochsner Foundation Hospital for a total of more than two months. When he was first admitted at Touro, surgery was performed and a traction pin wwas inserted into the proximal tebia. The operation wound was left open and the left leg was placed in traction for 17 days in order to allow drainage of the wound. The plaintiff was given a blood transfusion for excessive blood loss and had an indwelling catheter in place. He received IPPB treatments and blow bottle treatments to expand his lungs, which caused pain to his fractured ribs, in order to prevent pneumonia. He also wore an anti-embolism stocking on his right leg to prevent the formation of blood clots.

The plaintiff was transferred to Ochsner on February 17, 1977. On March 7, 1977, he had an open reduction and Schneider nailing of the left femoral fracture. The thigh and hip wounds were sutured and drainage tubing was inserted. He was discharged from Ochsner on April 16 on crutches and still wearing a TED hose to prevent blood clots.

Thereafter, he was seen by Dr. A. William Dunn on an out-patient basis at Ochsner through November of 1978. Dr. Dunn saw him on numerous occasions during this period for complaints of leg and back pain, and, on March 20, 1978, Dr. Dunn diagnosed traumatic chondromalacia of the patella resulting from injuries sustained.

On March 28, 1978, Cavalier was readmitted to Ochsner Foundation Hospital for the removal of the Schneider nail and for a left patellectomy. A cylinder cast was applied, and he was discharged from the hospital on crutches on April 3, 1978. He was then placed on physical therapy for whirlppol and knee exercises and in the latter partof May was walking with the aid of a cane.

Dr. Dunn reported that plaintiff had reached maximum recovery by late November, 1978. Although Cavlier still compalined of pain in his back and knee at that time, Dr. Dunn found that the plaintiff had no trouble with his left hip and thigh, had full motion of his left knee and a 20% loss of internal rotation range of his left hip. That physician concluded that plaintiff would not, thereafter, be physically able to return to work as a longshoreman. Dr. Dunn found him to be depressed as a result of the accident and resulting injuries and referred him to a psychiatrist, Dr. Richard Mestayer.

Plaintiff was treated by Dr. Mestayer for depression from late 1978 through December, 1979. When Dr. Mestayer first saw plaintiff, he reported that Cavalier was severely depressed and had suicidal feelings which were secondary

to the injury of February 1, 1977. He was hospitalized on November 30, 1978, for this depression and was discharged on December 24, 1978; however, the plaintiff continued to experience depression during 1979. As early as January, 1979, Dr. Mestayer had recommended that the plaintiff seek some sort of employment, but this was not affirmatively acted upon.

In November, 1979, the plaintiff consulted Dr. Essam Elmorshidy for back pain which he (Cavalier) felt was related to the injuries received in the accident. On Febraury 7, 1980, he was admitted to Methodist Hospital by Dr. Elmorshidy for evaluation of the chronic back pain and lumbar disc syndrome. He was treated with chemotherapy and pelvic traction and was discharged approximately a week later. Plaintiff was still being treated for back pain in August, 1980.

The plaintiff was seen by Dr. James Williams on August 20, 1980, approximately three weeks before trial. Dr. Williams found that Cavalier had some diastasis of the symphysis pubis and a 20% partial permanent disability of the left knee as a result of the patellectomy.

From all of the above, I am convinced that plaintiff has experienced significant, long-term pain and suffering and that he will continue to suffer some intermittant pain and will continue to experience physical disabilities which will effectively obviate his returning to heavy work similar to his pre-injury status as a longshoreman. Accordingly, I believe that had plaintiff prevailed, he would have been entitled to an award for past, present,

future pain, suffering and disability in the amount of $110,000.00.

Furthermore, I believe that Cavalier would have been entitled to certain medical expenses which have been incurred but not, as yet, paid in his behalf. The include:

Dr. Essam Elmorshidy	$ 306.00
Dr. Richard Mestayer	580.08
Methodist Hospital	1,574.65
Ochsner Foundation Hospital	999.99
	$3,460.72

Finally, had plaintiff prevailed, he would be entitled to loss of wages, which I will discuss in further detail as follows: I conclude that plaintiff's annualized average income prior to his injury was $13,500 per annum, or $1,125 per month. Having concluded that Cavalier was totally idsabled form the date of the accident until the end of 1978, I find that during that period he sustained a wage loss of $25,000. I further conclude, based upon the medical and related testimony, that Cavalier, though able to return to limited employment (which he did not choose to do) in 1979, would have (even if he had done so) incurred a wage loss of $8,000 and, likewise, in the first half of 1980, $4,000. Thus, I conclude that Cavalier has experienced an overall past wage loss of $37,000.

Though plaintiff has a college degree and was, in my view, able, at the time of trial, to return to gainful employment in various capacities, he has not seen fit to do so. He contends that inside desk work

makes him nervous and that, as a matter of fact, he sought employment as a longshoreman to get away from the kind of inside desk work that he still seeks to avoid. These contentions may be accurate, and, yet, it is obvious to me that Cavalier has both the physical and mental capacity to adequately perform in a substantial spectrum of job opportunities. Furthermore, it is clear to me from the evidence adduced at the time of trial that Cavalier has been operating a taxicab business for several months and, in the course of same, has either operated his own taxicab and/or operated other owned vehicles through the use of other personnel who pay a certain overriding figure to Cavalier for the use of those vehicles which Cavalier has obtained and converted to taxicabs.

Even so, it is apparent that Cavalier will not be able to return to work as a longshoreman and will, more likely than not, over his work life expectancy, experience a future wage loss which, through not susceptible to categoric determination, will be, in my estimation, on the order of $50,000.00.

Accordingly, had I reached a different conclusion with respect to liability, I would have awarded the following:

Past, present and future pain and suffering and permanent disability	$110,000.00
Medical and hospital expenses	$ 3,460.72
Past, present and future wage loss	$ 87,000.00
	$200,460.72

October 15, 1980.

Peter Beer
U. S. District Judge

APPENDIX "B"

JUDGMENT

The Court, noting that in rem process against the M/V SEI SHIN was never perfected and having heretofore dismissed, without prejudice, the complaint of Martin Cavalier against Daiko Senkyo; having heard the evidence on plaintiff's complaint against the several remaining defendants; and having rendered findings of fact and conclusions of law based thereon:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein dismissing, with prejudice, the complaint and supplemental and amended complaint and the second supplemental and amended complaint of Martin Cavalier against T. Smith & Son, Inc., Employers National Insurance Company and Arkwright-Boston Manufacturing Mutual Insurance Company, at complainant's costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein dismissing, with prejudice, the intervention of Employers National Insurance Company.

IT IS FURTHER ORDERED that the cross-claim of T. Smith & Son, Inc., individually, against Employers National Insurance Company,as its primary liability carrier and as its compensation carrier, and the third party complaint and amended third party complaint of T. Smith & Son, Inc. against Arkwright-Boston Manufacturing Mutual Insurance Company, as its excess liability carrier, be and they are hereby dismissed as moot.

New Orleans, Louisiana,this 9th day of December, 1980.

Peter Beer
United States District Judge

APPENDIX "C"

OPINION OF CIRCUIT COURT OF APPEALS

Martin CAVALIER, Plaintiff-Appellant

v.

T. SMITH AND SON, INC., et al.,
Defendants-Appellees

United States Court of Appeals, Fifth Circuit

Feb. 26, 1982

Longshoreman brought negligence action against vessel owner. The United States District Court for the Eastern District of Louisiana, at New Orleans, 499 F. Supp. 650, Peter Hill Beer, J., held that longshoreman's suit was barred, and longshoreman appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that longshoreman's action was barred, where injury was caused by negligence of person engaged in providing stevedoring services to vessel.

Affirmed.

1. Worker's Compensation

Longshoreman injured by negligence of crew of vessel may sue owner of vessel even though owner is also his employer, liable to him for compensation under Longshoremen's and Harbor Workers' Compensation Act., §§ 1-51,33 U.S.C.A. §§ 901-950.

2. Workers' Compensation

Longshoreman's action for negligence of vessel owner was barred, where injury was caused by negligence of persons engaged in providing stevedoring services to vessel. Longshoremen's and Harbor Workers' Compensation Act, § 5(b), 33 U. S. C. A §905(b).

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

[1] A longshoreman injured by the negligence of the crew of a vessel may sue the owner of the vessel even though the owner is also his employer, liable to him for compensation under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C §§ 901-950(1976 & Supp. III 1979). Smith v. M/V Captain Fred, 546 F.2d 119, 122-23 (5th Cir. 1977). In this case the district court held that a longshoreman's suit is barred by the provisions of the LHWCA, however, if the negligence that caused the injury is attributable to members of the vessel's crew who are performing stevedoring services when the plaintiff is injured. This holding is based on an express provision of the LHWCA, and we, therefore, affirm.

The facts were stipulated. Because they are set forth at length in the district court's opinion, 499 F. Supp. 650 (E.D. La. 1980), we merely sketch them here. T. Smith & Son, Inc. ("T. Smith"), a general contract stevedore, contracted with the owners of the M/V Sei Shin to discharge cargo from that ship and to load the cargo into river barges. Martin Cavalier, a longshoreman employed by T. Smith, was a member of a gang of longshoremen working inside a lower hold

of the ship hooking up bundles of cargo. The cargo was to be removed from the ship by a crane mounted on the derrick barge Patricia, owned and operated by T. Smith, then lying alongside the ship. The flagman and the operator of the derrick crane, both of whom were members of the derrick crew, controlled the passage of cargo as it was lifted up through open hatches of the ship. The crane operator could not see the loads until they cleared the coaming of the hatch at the main deck of the ship, so the flagman was positioned on the main deck of the ship giving hand signals to the crane operator. Cavalier was injured when, solely through the negligence of either the crane operator or the flagman, a draft of pipes failed to clear the hatch coaming, causing the pipes to slip out of their sling and fall into the hold below, injuring Cavalier. T. Smith through its compensation insurer, paid Cavalier compensation benefits under the provisions of the LHWCA. Cavalier now seeks to recover from T. Smith for negligence in causing his injury.

[2] In Smith v. M/V Captain Fred, supra, we analyzed the applicability of 33 U.S.C. 905(b) when longshoremen working on a vessel owned by their employer are injured through the fault of members of the crew of the vessel. We have since applied its precepts when the crew members were not performing stevedoring work. Bossard v. Port Allen Marine Service, Inc., 624 F.2d 671 (5th Cir. 1980) (per curiam). However, the scope of Smith v. M/V Captain Fred is limited by the statute itself,[1] which provides that an action for "negligence of a vessel" cannot be

brought "if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." That proscription fits this case perfectly. The authority of Smith v. M/V Captain Fred stops at the statute's bar. This is the interpretation given the LHWCA by other Courts of Appeals. Richardson v. Norfolk Shipbuilding & Drydock Corp. 621 F.2d 633, 634-635 (4th Cir. 1980); Smith v. Eastern Seaboard Pile Driving, Inc., 604 F. 2d 789, 795 (2d Cir. 1979); Griffith v. Wheeling Pittsburgh Steel Corp. 521 F.2d 31,41(3d Cir. 1975), cert. denied, 423 U.S. 1054, 96 S. Ct. 785, 46 L.Ed.2d 643 (1976).[2]

We join these courts in following the clear language of the statute and we AFFIRM for these reasons and for the additional reasons set forth in the district court's clear opinion.

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1 Section 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services

to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(Emphasis added.)

. . . . . .

2 Accord, Mayfield v. Wall Shipyard, Inc., 510 F. Supp. 605, 608 (E.D.La. 1981).

ON REHEARING

BEFORE RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

April 13, 1982

CERTIFICATE OF SERVICE

I, George J. Kambur, attorney for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this____day of July, 1982, I did serve the requisite number of copies of the foregoing Petition for a Writ of Certiorari and Appendicies on all attorneys for the respondents by mailing said copies to them, postage prepaid and addressed as follows:

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